NO. 01-1862EMSL
Criminal

In The United States Court of Appeals
For The Eighth Circuit

UNITED STATES OF AMERICA,

Appellee

v.

DR. CHARLES THOMAS SELL, D.D.S

Appellant

Appeal from the United States District Court
for the Eastern District of Missouri

Amicus Curiae Brief
Association of American Physicians & Surgeons, Inc.

Filed in Support of Appellant
Charles Thomas Sell
Supporting Reversal

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v.	**)**	**Crim. No. 01-1862EMSL**
	)	
DR. CHARLES THOMAS SELL, D.D.S.	**)**	
	)	
Appellant.	**)**	

The undersigned counsel of record certifies that the Association of American Physicians & Surgeons, Inc., is a non-profit, membership organization and it has an interest in the outcome of this case. These representations are made in order that the judgment of this court may evaluate possible disqualification or recusal.

Karen Tripp
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Attorney of Record for Amicus Curiae

Concise Statement of Identity of Amicus Curiae, Interest in the Case, and Source of Authority to File

Founded in 1943, the Association of American Physicians & Surgeons, Inc. ("AAPS") is a national non-profit organization of thousands of physician members in every specialty. We are one of the largest physician associations that is entirely membership-funded. We only recently learned of the profound issue in this case, and the absence of representation here by physicians and patients at large.

AAPS is dedicated to defending the patient-physician relationship and the ethical principles embodied in the Oath of Hippocrates. We consistently file amicus curiae briefs in defense of the ethical practice of medicine, which gravely concerns physicians and patients alike. AAPS respectfully submits this brief in the expectation that, if forcible administration of mind-altering drugs is ordered here, then this case will be appealed to the Supreme Court based on its enormous significance and its tension with *Riggins v. Nevada*, 504 U.S. 127 (1992), and *Washington v. Harper*, 494 U.S. 210 (1990).

Amicus has a direct and vital interest in the issue of Court-ordered, mind-altering drugs due to its impact on the integrity and practice of medicine.

Argument

AAPS argues against a precedent that a state may forcibly drug its citizens, even if they are highly offensive, because that would establish a dreadful precedent for the medical profession, the patient-physician relationship, and human rights in general. Such precedent could not be limited to the unusual facts at bar, and abuses would be inevitable. The use of drugs as punishment is likely to result. Experimentation on inmates is also a foreseeable result.

Four fundamental principles militate against forcing mind-altering drugs on peaceful defendants, as explained below. The district court decision lacks adequate protections against abuse, and meaningful protections may be impossible to construct. The forcible drugging of a peaceful defendant inexorably leads to violations of the Supreme Court prohibition against the use of drugs as a punishment.

I. Peaceful Defendants Have the Right to Refuse Mind-Altering Drugs.

It has been axiomatic since the end of World War II that peaceful citizens and prisoners have the right to refuse forced drugging, particularly with mind-altering drugs. "The voluntary consent of the human subject is **absolutely essential**." *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Nuremberg,

October 1946–April 1949 (Washington, D.C.: U.S. G.P.O, 1949–1953) (emphasis added). The right of informed consent by the patient is as essential to the integrity of medicine as the right to defense counsel is to legal process.

The Supreme Court has repeatedly upheld this fundamental patient right. In *Washington v. Harper, supra*, several Justices emphasized that:

> Forced administration of antipsychotic medication may not be used as a form of punishment. This conclusion follows inexorably from our holding in *Vitek v. Jones*, 445 U.S. 480 (1980), that the Constitution provides a convicted felon the protection of due process against an involuntary transfer from the prison population to a mental hospital for psychiatric treatment.

494 U.S. at 242 (Stevens, Brennan, Marshall, JJ., concurring and dissenting in part). *See also Harper,* 494 U.S. at 229, *quoted infra*. They continued:

> Crucial to the Court's exposition of this substantive due process standard is the condition that these drugs "may be administered for no purpose other than treatment," and that "the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement."

Id. at 243 (quoting 494 U.S. at 226, 222). The Justices declared that "a competent individual's right to refuse such medication is a fundamental liberty interest deserving the highest order of protection." *Id.* at 241 (citations omitted).

The patient's right of informed consent is essential to the integrity of medicine, and there is no end to the potential abuse that can result from denying that right. Allowing third parties, such as the State, to forcibly inject

drugs into a peaceful patient opens the door to endless ethical quandaries and potential exploitation. For example, the stronger the patient objection, the greater the pressure to increase the dosage of the mind-altering drug to minimize the continuing conflict. The treatment itself is thereby quickly influenced by the level of cooperation of the patient. This corrupts the patient-physician relationship, and allows drug choice and dosage to be influenced by the conflict between patient and physician.

Even experimental uses of drugs are possible under the decision below. The testimony by Dr. Wolfson hints at the prospect of using new drugs on prisoner Sell:

> Q: Now, let me ask you this, what medications would you propose for Dr. Sell if you were to treat him?
>
> A: … There is another [drug] that they are hoping to have in a few months, that on paper looks very promising as well called Ziprazodone, Z-I-P-R-A-Z-O-D-O-N-E. As usual, there's experiment in Europe well before [its] introduction here. So that can be considered [too], if shows up in time ….

Medication Hearing Transcript, September 29, 1999 at 90.

The testimony that a new drug would be used on prisoner Sell "if [it] shows up in time" is disconcerting. *Id.* Would approval in Europe be

considered adequate for use on this American prisoner, once his right to refuse has been denied? Even if the FDA approval is implicitly required here, drugs approved for one use by the FDA are often prescribed by physicians for unapproved and untested, "off-label" use. *See, e.g., "Off-Label" and Investigational Use of Marketed Drugs, Biologics, and Medical Devices*, FDA Guidance for Institutional Review Boards and Clinical Investigators (1998).[1] This "off-label" use is based on patient consent, which is lacking here. Yet the decision below does not limit the power of the prison medical staff to drug Dr. Sell, and thus allows "off-label", experimental use without the patient's consent.

Indeed, the opinion below lacks any safeguards against potential abuse, giving *carte blanche* to prison medical staff to inject dangerous drugs, even in an untested manner, into a peaceful prisoner they already dislike. The decision removes the essential protection of informed consent against abusive treatment with respect to an uncooperative prisoner. The prison staff is unlikely to heed patient complaints about adverse effects of the drugs, let alone allow the patient to assist in his treatment.

The irony is that the decision below trammels upon the patient's central role in assisting in his medical treatment, in order to promote the

[1] Available online at http://www.fda.gov/oc/ohrt/irbs/offlabel.html (viewed 10/3/01).

defendant's role in assisting in his legal defense. Such court-imposed tradeoff, of life interest for adjudication of liberty, is not permissible as long as the defendant is innocent until proven guilty. Justice at this stage of the proceeding requires assuming that Dr. Sell may be innocent, and the State lacks the power to prescribe mind-altering drugs for a peaceful citizen presumed to be innocent.

II. State Power to Drug Its Non-Violent Enemies Creates the Appearance of the Use of Drugs as Punishment, Contrary to Supreme Court Precedent.

The Government portrays defendant Sell as a highly offensive, even despicable, individual. Govt. Br. at 7. The more despicable the portrayal of Dr. Sell is, however, the less appropriate the ordering of forced antipsychotics. Highly deplorable behavior by a prisoner makes it more likely, not less so, that forced drugging will be punitive rather than salutary. Such punitive use of drugs is not adequately precluded by the decision below, but it is expressly prohibited by the Supreme Court. *See Harper*, *supra*.

Moreover, the appearance that Dr. Sell is being punished through mandatory drugging may be inescapable here. The Government brief essentially argues that Dr. Sell be drugged based on his deplorable behavior.

But such behavior is largely irrelevant to whether Dr. Sell is clinically insane, on which this appeal must be decided.

The court below failed to find that Dr. Sell was legally insane, and incompetent to aid in his defense at trial -- the only conceivable justification for mandatory drugging here. Instead, the court cited conspiracy-theory views held by Dr. Sell about the government:

> (i) Dr. Sell thought there was a government plot to cover up illegal behavior by corrupt individuals to spread HIV worldwide;
>
> (ii) Dr. Sell thought there was a government effort to cover up defendant's knowledge of the government's culpability in the Waco deaths, where defendant was summoned to serve at that time as an Army Reservist; and
>
> (iii) Dr. Sell thought he should go to Bosnia, and that if he was prevented from going there then somebody wanted a lot of American boys dead.

Slip Op. at 8-9 (citing psychiatric and psychological reports). Even if delusional about the Government, there is no showing that any of this would prevent Dr. Sell from satisfying the legal standard of being able to aid in his defense.

Conspiracy-theorist critics of the government abound, but should not be at risk for court-ordered antipsychotics. Some thought that Oliver Stone was delusional in claiming that a governmental plot assassinated JFK. While that theory is as far-fetched as Dr. Sell's, it would not support forced drugging. Some disagreed with Pat Matrisciana's documentary about alleged governmental conspiratorial conduct entitled "Obstruction of Justice: the Mena Connection," which was recently addressed by this Court. *See Campbell and Lane v. Citizens for an Honest Government, Inc.*, 255 F.3d 560 (8th Cir. 2001) (reversing libel judgment against Matrisciana). These conspiracy theories, even if "delusional" to some, surely do not justify forcibly medicating the theorist with mind-altering drugs.

The decision below lacks factual support for the draconian measure of compelled antipsychotic medication. The Government brief contains stronger arguments for punishment than for forced medication, but the latter must not be used for the former.

III. A Side Effect of Death Is Unacceptable for Forced Medication of a Peaceful Prisoner.

The Court below recognized three potential adverse effects from the mind-altering drug at issue: "tardive dyskinesia, sedation, and neuroleptic malignant carcinoma." Slip Op. at 5. The court then reviewed each of these stated side effects, and concluded that "the medical benefits outweigh the

medical risks, giving due weight to the range of seriousness of the various risks." *Id.* at 6.

There is no such thing as "neuroleptic malignant carcinoma." *All* carcinomas are, by definition, malignant tumors, and typically develop slowly. The real side effect at issue here is "neuroleptic malignant syndrome," and it is sudden and horrifying. Its manifestations include fever to 106 degrees F, labile blood pressure, rapid heart beat, profuse sweating, shortness of breath, incontinence, catatonic behavior, coma, generalized rigidity, and pseudoparkinsonism. Its mortality rate is 20%. Fatalities typically occur soon after onset, often due to renal failure, arrhythmias, pulmonary emboli, or aspiration pneumonia. *See* Petersdorf RG, *Hypothermia and Hyperthermia*, *in* Harrison's Principles of Internal Medicine at 2476-2477 (McGraw Hill, 13th ed. 1994).

The Government brief, the Magistrate's decision, and the district court's opinion all misstate, and may have misunderstood, this medical side effect. Govt. Br. at 37; Memorandum and Order of the United States Magistrate Judge Adelman at 9 (Aug. 9, 2000); Slip Op. at 5. Imposing a risk of a horrifying death on a prisoner is contrary to the presumption that he is innocent until proven guilty. What happens if the prisoner, presumed innocent, dies from the forced drugging that he objected to? *See*, *e.g.*,

Riggins, 504 U.S. at 134 ("'The forcible injection of medication into a nonconsenting person's body … represents a substantial interference with that person's liberty.' In the case of antipsychotic drugs … that interference is particularly severe ….") (quoting *Harper*, 494 U.S. at 229).

Dr. Wolfson testified that none of his patients developed this syndrome, but that evidence is meaningless without a comparison of the dosage intended for Dr. Sell with the average dosage for Dr. Wolfson's prior patients. Incidence of side effects increase with dosage level, and the court below placed no limits on the dosage or even the ingredients of the forced drugging. Under the court order, the prison staff is free to administer as much dosage as they see fit, which creates the enormous potential for abuse and adverse effects. *See, e.g.*, *Riggins*, 504 U.S. at 133 (holding in favor of the drugged defendant Riggins and noting that "defense counsel stressed that Riggins received a very high dose of the drug").

Finally, it is worth observing that the hearing and testimony by the physicians were conducted over two (2) years ago, on September 29, 1999. Even then, the testimony at that hearing was in the context of Dr. Sell's alleged threat of harm to those around him, which the court below rightly rejected as possibly a "post hoc justification." Slip Op. at 12. Medical needs of a patient often change dramatically over twenty-four months, and

here the purpose of the medication has subsequently departed from controlling an allegedly dangerous prisoner. At a minimum, a new hearing with new cross-examination of expert witnesses is necessary to evaluate the appropriateness of forced medication, in light of the passage of time and modified rationale.

IV. Forced Drugging Causes Breach of Medical Ethics by Physicians.

Physicians are duty-bound to abide by the wants of their patients, just as attorneys must answer to their clients. Like trial attorneys who rely on the assistance of their defendants, physicians must also rely on the assistance of their patients in treating them.

Dr. Wolfson conceded that Dr. Sell's cooperation is important to the efficacy of the proposed treatment, upon which the Magistrate Judge relied. "Wolfson says that the medical literature, his own experience, and the very experts relied on by the defendant's psychiatrist, show that anti-psychotic medications, **when combined with psychotherapy**, are effective in the treatment of delusional disorder." Magistrate Op. at 8 (emphasis added). Where, as here, that patient consent for and participation in the treatment is non-existent, the treatment is nonproductive.

Such external interference with the patient-physician relationship also causes a breach of medical ethics. Under the court order, the physician heeds the command of a third party (the court) rather than the patient (Dr. Sell). Asking a physician to administer treatment that the patient rejects is akin to asking a defense attorney to enter a plea bargain that the defendant rejects. The physician, like the attorney, should attempt to persuade the patient of the desirability of a given treatment, but the ultimate determination must remain with the patient to accept or reject the treatment.

Conclusion

The decision below should be reversed in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Federal Rule of Civil Procedure 32(a)(7)(B). It has a total of 2,689 words. Pursuant to Eighth Circuit Rule 28A(c), I further certify that the word processing software used to prepare the brief was Microsoft Word 97.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing document and one 3 ½ inch diskette that has been scanned for viruses and is virus free, were sent, by overnight delivery, this 4th day of October, 2001, to the following attorneys of record:

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